No. 17-1364

In the
Supreme Court of the United States

STATE OF NORTH CAROLINA, *et al.*,
Appellants,

v.

SANDRA LITTLE COVINGTON, *et al.*,
Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

APPELLANTS' SUPPLEMENTAL BRIEF

PHILLIP J. STRACH
MICHAEL D. MCKNIGHT
OGLETREE, DEAKINS, NASH SMOAK & STEWART, P.C.
4208 Six Forks Road
Suite 1100
Raleigh, NC 27609

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
MICHAEL D. LIEBERMAN
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Appellants Senator Robert Rucho, in his official capacity as the Chairman of the North Carolina Senate Redistricting Committee; Representative David Lewis, in his official capacity as the Chairman of the North Carolina Senate Redistricting Committee; Senate Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate; and Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives

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SUPPLEMENTAL BRIEF

The racial-gerrymandering holding in this case is premised on the notion that the legislature did not do enough to "eliminate[] the discriminatory effects of the racial gerrymander" in the 2011 Plan. JS.App.38-39. That is the same theory that this Court just squarely rejected in *Abbott v. Perez*, Nos. 17-586 & 17-626 (June 25, 2018), which confirmed that a court's focus in assessing a racial-gerrymandering claim must be on the intent of the legislature that enacted the challenged plan, not the intent of the legislature that enacted the plan that it replaced. While the intent of the prior legislature may be relevant, *Abbott* confirms that it may not be used to displace the presumption of good faith or to shift the burden to the State to show the absence of taint.

The district court in this case did exactly that, concluding that the 2017 Plan was a racial gerrymander not because the General Assembly that enacted it was predominantly motivated by race, but because the General Assembly purportedly did not do enough to cure the prior plan of the taint of racial gerrymandering. Because the court's once-a-gerrymander-always-a-gerrymander logic directly contravenes *Abbott*—and because the court lacked jurisdiction to consider plaintiffs' state-law claims—the decision below cannot stand as to either their federal or their state-law claims. Indeed, plaintiffs' racial-gerrymandering claims plainly fail as a matter of law in light of *Abbott*, as it is *undisputed* that the General Assembly *did not consider race*. Because reversal or vacatur of the decision below will eliminate any extant basis for displacing the duly enacted 2017

Plan or for imposing the Special Master's Plan, moreover, this Court should provide certainty for the 2018 election cycle and make clear that the 2018 elections should be conducted under the legislatively enacted 2017 Plan.

I. In *Abbott*, this Court vacated the district court's decision holding that the Texas Legislature's 2013 districting maps failed to cure the "taint" of discriminatory intent allegedly harbored by the 2011 Legislature. The Court emphasized that the burden of proof on any claim that a state law was enacted with discriminatory intent always lies with the challenger to the law, not with the State. *Abbott*, slip op. 21. This rule, which "takes on special significance in districting cases," is not changed by a finding of past discrimination by a prior legislature. *Id.* at 21-22. No matter what came before, the "ultimate question" in any racial-gerrymandering case remains "whether a discriminatory intent has been proved in a given case." *Id.* at 22 (quoting *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980)); *see* Br. Opp. Mot. to Aff. 7. Thus, when plaintiffs claim that a districting plan was enacted with improper motive, "there can be no doubt about what matters: It is the intent of" the legislature that enacted the challenged plan. *Abbott*, slip op. 23.

This Court held that the district court there violated those precepts by requiring Texas to prove that the 2013 Legislature "cured any taint from the 2011 Plans." *Id.* at 23. While the intent of the 2011 Legislature may be relevant to the extent that it "give[s] rise to—or tend[s] to refute—inferences regarding the 2013 Legislature," the intent of the previous legislature is nothing more than "evidence"

that can be marshaled in support of—or against—an ultimate finding that the later-in-time legislature *itself* acted with an improper motive. *Id.* at 26. After holding that the Texas court applied an improper standard, this Court weighed all of the record evidence about legislative intent and concluded that it was "plainly insufficient to prove that the 2013 Legislature acted in bad faith and engaged in intentional discrimination." *Id.* at 26.

II. The Court's reasoning and holding in *Abbott* resolve the racial-gerrymandering claims in this case.[1] Just like the Texas court in *Abbott*, the North Carolina court improperly asked whether the 2017 Plan "eliminate[d] the discriminatory effects of the racial gerrymander" in the 2011 Plan, instead of whether the challenged districts in the new legislation were themselves racially gerrymandered. *See* JS22. As *Abbott* confirms, the "ultimate question" should have been whether SD21, SD28, HD21, and HD57 were themselves racial gerrymanders—*i.e.*, districts drawn on the basis of race—not whether their composition sufficiently "eliminate[d] the discriminatory effects of the racial gerrymander" in the 2011 Plan. But the district court never asked that crucial question, and certainly never found that the 2017 General Assembly was predominantly motivated by race. To the contrary, the court acknowledged that the 2017 General Assembly *did not consider race at all.* JS21-

[1] This Court need not even reach the merits of the district court's racial-gerrymandering decision because the district court improperly retained jurisdiction over a moot controversy. JS16-20. But if this Court does reach the merits, the decision in *Abbott* dictates the result of the racial-gerrymandering claims.

22. *Abbott* thus confirms that the district court erred by requiring the General Assembly to affirmatively eliminate the "effects" of the prior plan's racial gerrymander instead of simply asking whether the 2017 General Assembly itself was predominantly motivated by race—which it undisputedly was not. JS20-25.

III. Because the district court applied an improper standard and invalidated the 2017 Plan without any finding that the 2017 General Assembly acted with an improper motive, the racial-gerrymandering aspect of the decision below cannot stand. Indeed, under the correct standard, it is clear that plaintiffs not only did not, but could not meet their burden of proving that any of the challenged districts were racially gerrymandered, as it is undisputed that the 2017 General Assembly *did not consider race*. In addition, as explained in the jurisdictional statement, the district court's state-law rulings cannot stand, as the court lacked jurisdiction over plaintiffs' state-law challenges and, in all events, erred on the merits. JS25-30. The judgment below therefore must be reversed and/or vacated in its entirety, and along with it the district court's injunction requiring the State to hold the 2018 elections under the Special Master's Plan.

Indeed, once the judgment below is eliminated, there will be no longer be any basis for requiring the State to hold the 2018 elections under the Special Master's Plan, instead of the plan duly enacted by the state legislature. Without an extant ruling that the legislature's plan violates the Constitution or federal law, a federal court may not displace a legislatively

enacted plan or force a State to use a court-imposed plan. *Perry v. Perez*, 565 U.S. 388, 398 (2012). And here, the plaintiffs plainly have not met their burden of proving any infirmity in the 2017 Plan. There is thus no legal authority for a federal court to compel the people of North Carolina to hold elections under anything other than their duly enacted districting plan. This Court should provide certainty to North Carolina voters by making clear that the 2018 elections will occur under the duly enacted 2017 Plan.

Precisely because it was duly enacted by the General Assembly, returning to the 2017 Plan for the upcoming 2018 elections will cause only minimal disruption to the ongoing election process and is far preferable to holding those elections under a Special Master's map that now lacks any legal justification. In light of this Court's partial stay, the district court's decision displaced legislative districts in only three of North Carolina's 100 counties, and it affected just five of the 50 districts in the State Senate and six of the 120 districts in the State House. And in all events, the minimal disruption necessitated by undoing the district court's late-breaking and now-wholly-invalid injunction pales in comparison to the irreparable harm the State would suffer if its duly enacted districting map were displaced in the absence of any finding that it actually suffers from the constitutional infirmities plaintiffs have alleged.

CONCLUSION

This Court should reverse the district court's gerrymandering decision, vacate its state-law ruling for lack of jurisdiction, and immediately reinstate the 2017 Plan with instructions that it should govern the 2018 elections.

Respectfully submitted,

PHILLIP J. STRACH
MICHAEL D. MCKNIGHT
OGLETREE, DEAKINS, NASH SMOAK & STEWART, P.C.
4208 Six Forks Road
Suite 1100
Raleigh, NC 27609

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
MICHAEL D. LIEBERMAN
KIRKLAND & ELLIS LLP
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